IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

DOLORES ALLEN, Individually and as Personal Representative of the Estate of Max Allen and Wrongful Death Personal Representative of Max Allen, Deceased.

Plaintiff,

vs. Cause No. 2:14-CV-00246-GBW-LAM

DAVID BROWN,

Defendant.

REPLY IN SUPPORT OF DEFENDANT DAVID BROWN'S MOTION FOR PROTECTIVE ORDER

COMES NOW Defendant David Brown ("Defendant"), by and through his counsel of record, Civerolo, Gralow, Hill & Curtis, P.A. (Lance D. Richards, Esq. and Megan Day Hill, Esq.) and submits this Reply in Support of his Motion for Protective Order, seeking an Order from this Court protecting his medical records and information, mental health records and information, social security records and information, pharmaceutical records and information, employment records and financial records and information.

ARGUMENT

I. DEFENDANT BROWN'S MEDICAL, MENTAL HEALTH AND PHARMACEUTIAL RECORDS AND INFORMATION ARE PRIVILEGED, CONFIDENTIAL, PRIVATE AND IRRELEVANT.

II.

In her Response, Plaintiff reasons that when it comes to discovery, "what is good for the goose, is good for the gander." Rather than tailor discovery to any identifiable need, Plaintiff simply regurgitated the discovery she received from Defendant. Plaintiff urges this Court to conclude that if she produced records and releases on behalf of decedent, she is entitled to the same information from Defendant Brown. (*See* Plaintiff's Response to Motion for Protective Order at 2, Doc. 28).

Plaintiff's argument misses the mark. Unlike Defendant Brown, by filing this lawsuit, Plaintiff placed the decedent's medical, physical and emotional condition at issue and, as a result, waived any privilege or privacy interests. As the United States Supreme Court observed, "[a] plaintiff in a negligence action who asserts mental or physical injury ... places that mental or physical injury clearly in controversy...." *Schlagenhauf v. Holder*, 379 U.S. 104, 119, 85 S.Ct. 234, 243 (U.S 1964). *See also LeFave v. Symbios, Inc.*, 2000 WL 1644154, at *4 (D. Colo.Apr. 14, 2000) (a party who seeks damages for physical, mental or emotional injury may not refuse production of medical information based on privacy; once the party makes a claim for damages and puts a medical condition at issue, privacy issues are waived).

Plaintiff concedes that Defendant Brown is not advancing any claim for injuries or damages, but argues that he put both his mental and physical health at issue by arguing that he "reasonably feared for his life and safety" at the time of the shooting. (*See* Sixth Affirmative Defense, attached as Exhibit 1 to Plaintiff's Response to Motion for Protective Order, Doc. 28). This argument must first be rejected because an emotion like fear—universal to the human experience—is not a medical "condition." As noted in Defendant's Memorandum Brief, a defendant must rely on a "condition" as an element of his defense for a physician-patient waiver to occur. (*See* Memorandum Brief at 3, Doc. 26, *citing* NMRA 11-504(D)(3)). Without a qualifying "condition," there can be no waiver. While New Mexico has not defined "condition" in this context of the physician-patient context, it is well established in other jurisdictions that:

> A qualifying condition 'is not transitory or ephemeral.' Rather, a condition must be 'a state that persists over time and significantly affects a person's perceptions, behavior, or decision making in a way that is relevant to the reliability of the person's testimony.'

McCloud v. State, 310 P.3d 767, 770 (Utah App. 2013) (internal citations omitted). As one federal court observed:

> Plaintiff also argues that [Defendant] put his mental condition at issue because Defendants assert in their answer that [decedent's] actions caused [Defendant] to reasonably fear for his life. Plaintiff fails to explain, however, how that assertion puts [Defendant's] mental condition at issue. . . . Also, it is too broad to say that, whenever a party states that he or she experienced a short-term emotion such as fear, this claim puts his or her long-term mental condition at issue.

Heilman v. Waldron, 287 F.R.D. 467, 476 (D.Minn. 2012). Simply put, emotions are not medical "conditions," within the meaning of the physician-patient privilege.

Even assuming, *arguendo*, that fear is a qualifying medical condition and some type of waiver has occurred, the requests are overly broad. A waiver extends only to information relating to the medical condition in question. It does not automatically open all of a defendant's past medical history to scrutiny. *Pina v. Espinoza*, 130 N.M. 661, 666, 29 P.3d 1062, 1067 (N.M. App. 2001). Plaintiff seeks all medical, pharmaceutical and mental health records from the last 11 years. Such an overly broad request for irrelevant information is designed simply to embarrass, harass and intimidate Defendant Brown. This is not a permissible discovery purpose.

The instant motion should further be granted because the information requested is irrelevant. *See* Fed. R. Civ. P. 26(b)(1) (a party "may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense"). Plaintiff argues that Defendant Brown's medical and mental health records might be relevant to establish Defendant Brown's "frame of mind before and when he shot Max Allen." (*See* Plaintiff's Response to Motion for Protective Order at 2, Doc. 28). This argument must be rejected because any medical records are distant in time, and do not record or reflect the degree, intensity or duration of Defendant Brown's fear response on the date in question. Similarly, they cannot be used to predict Defendant Brown's response to emotionally laden and terrifying stimuli. As a result, the records should be protected from discovery efforts.

If Plaintiff is, in fact, trying to establish Defendant Brown's state of mind on June 30, 2013, this information is available through other less intrusive means. More specifically, in the hours before the shooting, the Browns went to the Curry County Sheriff's Office and begged for intervention and assistance. As Officer Erica Romero recorded in her report:

> During our talk, however, both Browns showed a real fear of Allen and stated that they had been having increasing problems with him. We advised them that they could protect themselves, and we spoke about concealed carry, open carry, and having firearms in your vehicle. David Brown advised that he didn't want to carry a gun, but was afraid enough of Allen to think about it. He also asked if we (the county) would do something about it, because he felt that Allen was going to kill somebody one day (soon) due to his violent and unstable behavior.

(*See* Portion of Curry County Sheriff's Report, attached hereto as Exhibit A). Thus, Officer Erica Romero is an objective, third-party witness who could provide Plaintiff with the information she seeks with respect to Defendant Brown's "frame of mind" in the hours before the shooting.

Plaintiff Allen further seeks "any communications Defendant Brown might have had with a counselor that might shed light on his behavior at the time he killed Max Allen." (*See* Plaintiff's Response to Motion for Protective Order at 2, Doc. 28). While Defendant Brown has not yet been to see a counselor, therapist or psychologist, a Protective Order is still needed from this Court. Defendant Brown suffered an emotional trauma as a result of the shooting. While he does not seek damages for this trauma, the lasting effects interfere with his daily living and volunteer firefighter duties. The specter of litigation and overly broad discovery, unfortunately, makes Defendant Brown reluctant to seek the benefit of mental health support.

This undesirable, chilling effect was discussed by the United States Supreme Court in *Jaffee v. Redmond, et al.*, 518 U.S. 1 (1996). The Court reasoned that psychotherapist-patient communications must be zealously guarded to protect and promote the "mental health of our citizenry." *Id.* at 11. Without the protection of this Court, Defendant Brown cannot enjoy the benefit of confidential conversations or receive effective mental health therapy. Not only does the broadest protection possible benefit Defendant Brown, it promotes his return to his firefighting duties and benefits the rural communities he serves.

III. DEFENDANT BROWN'S SOCIAL SECURITY RECORDS AND INFORMATION ARE PRIVILEGED, CONFIDENTIAL, PRIVATE AND IRRELEVANT.

Plaintiff next seeks a lifetime of social security records.[1] Plaintiff argues that social security records are necessary for her to determine Defendant Brown's ability to pay the $6.2 million judgment she anticipates being awarded by a jury in this case. (*See* Plaintiff's Response to Motion for Protective Order at 6, Doc. 28). Plaintiff's discovery position must be rejected for several reasons.

To begin with, social security records are privileged. Social security records can contain medical information, wages, employers, and much more. Due to the sensitive nature of these records, they are protected by section 1106 of the Social Security Act, 42 U.S.C. § 1306, the Privacy Act of 1974, 5 U.S.C. § 552(a), section 6103 of the Internal Revenue Code, 26 U.S.C. § 6103 and related Social Security regulations and policies.

Not only are the requested records privileged, they are irrelevant. *See* Fed. R. Civ. P. 26(b)(1) (a party "may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense"). First, Plaintiff fails to explain how Defendant Brown's historic earnings bear any relationship to his ability to satisfy a judgment now. Second, social security benefits are not subject to garnishment and so are irrelevant. *See* 42 U.S.C. § 407. Third, it is

[1] Defendant Brown is 60 years old.

well established that a plaintiff may not seek discovery from a defendant to determine whether that defendant has the means to satisfy a judgment. *See, e.g.*, *Ranney–Brown Distributors, Inc. v. E.T. Barwick Industries, Inc.*, 75 F.R.D. 3, 4 (S.D. Ohio 1977) (finding that "ordinarily, Rule 26 will not permit the discovery of facts concerning a defendant's financial status, or ability to satisfy a judgment, as such matters are not relevant, and cannot lead to the discovery of admissible evidence"); *Bogosian v. Gulf Oil Corp.*, 337 F.Supp. 1228, 1230 (E.D. Pa.1971) (finding that questions concerning a defendant's net worth and ability to satisfy a judgment "are not relevant to the subject matter of the lawsuit"); *United States ex rel. P.W. Berry Company, Inc. v. General Electric Company*, 158 F.R.D. 161, 164 (D. Or.1994) (finding that plaintiff's tax returns and financial statements were not relevant to the issues in a contract case and therefore subject to a protective order); 6 Moore's Federal Practice § 26.41[8][a] (3d ed.) (defendant's financial condition is generally not relevant and therefore not subject to discovery). A case is about the events that gave rise to it, not about the wealth of the individuals involved.

The instant motion must be granted because the information sought by Plaintiff is premature. While Plaintiff may feel that she is entitled to a $6.2 million judgment, the jury may well disagree. After all, a Clovis grand jury acquitted Defendant Brown and found no wrongdoing on his part. If Plaintiff does ultimately recover a judgment, her recourse is to initiate proceedings pursuant to Rule 69 of the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 69 (a)(2). Plaintiff can then conduct discovery to determine what assets are available to satisfy a judgment.

IV. DEFENDANT BROWN'S EMPLOYMENT AND PERSONNEL RECORDS ARE CONFIDENTIAL, IRRELEVANT AND IMMUNE FROM DISCOVERY.

As noted in Defendant Brown's Motion for Protective Order, Plaintiff also seeks all of Defendant Brown's employment and personnel records. (*See* Memorandum Brief at 6-7, Doc. 26). Plaintiff does not dispute that Defendant Brown was a self-employed farmer and there is no suggestion that, at the time of the shooting, Defendant Brown was in the course and scope of his employment for another. Yet, Plaintiff argues that she is entitled to employment and personnel information because she might be able "to glean information about Defendant Brown's financial condition." (*See* Plaintiff's Response to Motion for Protective Order at 7, Doc. 28).

As noted above, it is well established that a plaintiff may not seek discovery from a defendant to determine whether that he has the means to satisfy a judgment. Those authorities, cited above and in Defendant's Memorandum Brief, are incorporated herein. (*See* Memorandum Brief at 6-7, Doc. 26).

To support her position, Plaintiff argues the reasoning of *Constand v. Cosby*, 232 F.R.D. 494, 499 (E.D. Pa. 2006), does not apply to this case. She reasons that a case involving "a celebrity is hardly comparable to obtaining employment records of a farmer." (*See* Plaintiff's Response to Motion for Protective Order at 7, Doc. 28). Again, Plaintiff misses the point. Under our system of jurisprudence, all litigants stand as equals before the law. It does not matter if a defendant is a "celebrity" or a "farmer." Both are entitled to privacy protections and to be free from intrusive and harassing discovery, especially in the absence of any demonstrated relevance or compelling need.

V. DEFENDANT BROWN'S TAX RETURNS ARE CONFIDENTIAL, IRRELEVANT, OVERLY BROAD AND IMMUNE FROM DISCOVERY.

Plaintiff finally seeks state and federal income tax returns for Defendant Brown and Bar 7 Cattle Company. Good cause exists to enter a Protective Order because, first, Bar 7 Cattle

Company is not a party to this lawsuit. Not only is Plaintiff seeking information from a non-party, the request also seeks confidential, private, irrelevant and highly sensitive information from this individual Defendant.

To begin with, Plaintiff concedes that Bar 7 Cattle Company is not a party. (*See* Plaintiff's Response to Motion for Protective Order at 8, Doc. 28). It is a Texas corporation. Thus, Plaintiff cannot use Rule 34 to obtain records from a non-party. *See Hobley v. Burge*, 433 F.3d 946, 949 (7th Cir. 2006) (Rule 45 subpoena is the only way to get documents from a non-party); *In re Greenwood Air Crash*, 161 F.R.D. 387 (S.D. Ind. 1995) (discussion of who constitutes a "party" under Rule 34).

With respect to Defendant Brown's individual tax returns, good cause exists for the entry of a Protective Order. It is well established that "courts do not favor compelling production of tax returns." *See e.g. Warren, et. al. v. Campbell Farming,* United States District for the District of New Mexico, Civil No. 05-441 JP/RLP. In this district, a two-pronged test has been developed to properly balance the liberal scope of discovery and the policy favoring the confidentiality of tax returns. *Id. citing Hilt v. SFC Inc.*, 170 F.R.D. 182, 189 (D. Kan. 1997). First, the returns must be relevant to the subject matter of the action, and second, there must be a "compelling need for the returns because the information contained therein is not otherwise readily obtainable." The burden of proof is on the party seeking production to show relevancy. Once that showing is made, the burden shifts to the party opposing production to show the information sought is readily obtainable from other sources. *Id., citing Hilt v. SFC Inc.*, 170 F.R.D. 182, 189 (D. Kan. 1997).

Plaintiff suggests that Defendant Brown's tax returns might be relevant to her claim for punitive damages. This argument must be rejected because Plaintiff seeks five years of tax returns. Such a request is overly broad, burdensome and irrelevant to the issue of punitive damages. While a defendant's present net worth could be an important factor for the jury to consider in determining an amount of punitive damages after a *prima facie* showing is made, a defendant's worth from some years ago is not relevant. *See e.g. Cincinnati Insurance Co. v. Clark*, 1992 WL 34128 (E.D. Pa. Feb. 19, 1992) (defendant only required to produce net worth).

Further, before a defendant's present net worth may be discovered, a plaintiff must make a *prima facie* showing of entitlement to punitive damages. Given that this is a shooting case, Plaintiff suggests that she need not make a *prima facie* showing of entitlement to punitive damages. (*See* Plaintiff's Response to Motion for Protective Order at 9, Doc. 28). This argument must be rejected because a Clovis grand jury acquitted Defendant Brown and found no wrongdoing on his part. Similarly, as noted above, Defendant Brown went to the Curry County Sheriff's Office and before the shooting begged for intervention and assistance. In the instant case, Max Allen was the aggressor and pursuing Defendant Brown with the intent to cause great bodily harm. Thus, good cause exists to require a *prima facie* showing before discovery of Defendant Brown's net worth. Not only will a *prima facie* showing protect Defendant Brown from an unwarranted invasion of privacy and harassment, it will not prejudice Plaintiff. Plaintiff does not require Defendant Brown's net worth before trial. If and when Plaintiff makes a *prima facie* showing of entitlement to punitive damages at trial, Defendant Brown can produce his net worth.

WHEREFORE, Defendant Brown moves this Court for an Order protecting his medical records and information, mental health records and information, social security records and information, pharmaceutical records and information, employment and personnel records information, and financial records and information from discovery efforts in this case and for such other relief as the Court deems just and proper.

Respectfully submitted,

CIVEROLO, GRALOW, HILL & CURTIS
A Professional Association

By: _[signature]_
Lance D. Richards
Megan Day Hill
Attorneys for Defendant
P.O. Drawer 887
Albuquerque, NM 87103-0887
(505) 842-8255

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that on this 4th day of August, 2014, a copy of the foregoing was submitted for electronic filing with the Court and the following parties or counsel were served by electronic means through the Court's CM/ECF electronic filing and service system as follows:

Attorneys for Plaintiff

Michael T. Garrett, Esq.
920 North Main Street
Clovis, NM 88101-5931
E-mail: garrettlaw@aol.com

[signature]
Lance D. Richards
Megan Day Hill

Incident#: 13-06-120

Curry County Sheriff's Office

700 North Main Street, Suite 4 Clovis, NM 88101 (575) 769-2335

STATION COMPLAINT UCR/Offense Code	DESCRIPTION	INCIDENT #
09Z (DEATH INVESTIGATION)	2417	13-06-120

REPORT TYPE	RELATED CAD #	DOT #	HOW RECEIVED
Criminal Incident Report	C13-026279		

WHEN REPORTED	LOCATION OF OFFENSE (HOUSE NO., STREET NAME)
06/30/2013 13:50	CR 44 / CR C

TIME OF OCCURRENCE	STATUS CODE	STATUS DATE
06/30/2013 13:47	Active	06/30/2013

PROPERTY # / TYPE	RECOVERED BY / DESCRIPTION OF PROPERTY	BRAND / MODEL / SERIAL NUMBER	QUANTITY / PROPERTY VALUE
P13-06-120-37	Northern Forensic Lab	unknown unknown	1.0000
OTHER EVIDENCE/NON-PRO	#SRcontroltest2: One filter paper		
P13-06-120-38	Northern Forensic Lab	unknown unknown	12.0000
OTHER EVIDENCE/NON-PRO	#Test2MG: twelve pieces of photo paper		
P13-06-120-39			0.0000
OTHER EVIDENCE/NON-PRO	entered in error		
P13-06-120-4	Roberts, Kirk - C35	Integriswab 241596	1.0000
OTHER EVIDENCE/NON-PRO	Swab of smudge located on driver's side of the red Chevrolet pickup located on the roadway near the body. Marked as item 4A2		$0.10
P13-06-120-5	Roberts, Kirk - C35		1.0000
FINGERPRINT CARDS	Card with two of four lifted prints developed on the red Chevrolet pickup on scene. These2 prints were closest to the mirror and are labeled 4C1.		$0.10
P13-06-120-6	Roberts, Kirk - C35		1.0000
FINGERPRINT CARDS	Card with two of four lifted prints developed on the red Chevrolet pickup on scene. These2 prints were closest to the door handle and are labeled 4C2.		$0.10
P13-06-120-7	Loomis, Sandy - C6	CN Romarm SA/CVGR S1-34571-2001	2.0000
FIREARMS,RIFLE	Unloaded assault Rifle with wood stock and fore stock belonging to David Brown. Weapon used during incident and marked as Item 4D with magazine 4F.		$500.00
P13-06-120-8	Loomis, Sandy - C6		1.0000
AMMUNITION,RIFLE	Single live round 769X32 removed from chamber of AK-47 by Deputy Lara at scene.		$0.25
P13-06-120-9	Loomis, Sandy - C6		18.0000
AMMUNITION,RIFLE	Live rounds 769X32 removed from magazine taken from AK-47.		$4.50

NARRATIVES

PRIMARY NARRATIVE

On 06/30/13 at approximately 1100 hours, Deputy Lara and I were dispatched to Curry Road C and Curry Road 44

EXHIBIT A

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Incident#: 13-06-120

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in reference to a subject by the name of Max Allen, having a dispute with the farmers who had leased his land to farm, later identified as Kevin Brown. While enroute, dispatch advised us that Max Allen had just barricaded himself in his house and we were warned that he was armed and would probably shoot at law enforcement.

Upon our arrival, I made contact with Kevin Brown, and his dad, David Brown. The Browns advised that they had been farming this land, under contract, for the past 18 years, and that the contract was renewed every five years. They added that at this time, the contract was due for renewal at the end of this year but was valid until then. Kevin advised that he came to one of the fields today, and was spraying in the fields (in a large John Deere tractor/sprayer) when Max Allen, the owner of the land, drove across the field in his pickup. Kevin advised that Allen kept chasing him while he was in the sprayer, so he called his dad to come help him. When his dad arrived, they advised that Allen stopped, and started to dig for something in his truck. Both Browns advised that they got into the pickup (driven by David) and left the scene, fearing Allen was getting a gun.

The Browns advised that a couple of days ago, they had to call the police because Allen was throwing rocks at them while they were spraying the land that Allen's sister owned. The deputies responded out there, and after Allen contacted his sister and was advised that the Browns could be on her property, by her directly, Allen allegedly told everyone that he wouldn't bother them again. Everyone cleared from the scene at that time, and no arrests were made.

Today, when the Browns left, they advised that Allen took the semi truck keys to the truck with him, and motioned/gestured to Kevin to come and try and get them. That's when they called the police. Both David and Kevin advised that they wanted the keys back to the semi, but that they were too afraid to go to the house due to Allen having guns, and according to Kevin, had been threatened with a gun before by Allen.

Deputy Lara and I then went up to the house and made contact with Max Allen. He was outside, about to get on a bike. I asked him what was going on, and he advised that he wanted the Browns off his property. When I mentioned that there was a contract, Allen demanded to see the contract. I advised that I didn't have the contract or any knowledge, and that I was just told there was one. When I asked Allen about his sisters property, he stated that it was ok with her, so he didn't care about that, but that he didn't want the Browns on HIS property. I told him that I would tell them that, but asked if he had taken the keys to the semi. Allen admitted to taking the keys to the semi, because they Browns had taken his keys two days prior, but stated he would go get them. I followed him to the house, where he unlocked the doors. I asked him if I could come in, and he advised yes. I followed him inside, so I could observe him, and watched him get the keys. He handed them to me. I thanked him and told him that I would tell the Browns to leave for today, but that they needed to get this contract thing worked out.

We then responded back to where the Browns were waiting. I advised them what had transpired and stated that for

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today, they needed to get off Allen's property, and recommended that they contact their lawyer, to contact Allen's lawyer to remind Allen that he was breaching the contract. I did state, however, that Allen remembered that they could be on the sisters property, so they could go work on that one if they'd like. They advised they would.

* During our talk, however, both Browns showed a real fear of Allen and stated that they had been having increasing problems with him. We advised them that they could protect themselves, and we spoke about concealed carry, open carry, and having firearms in your vehicle. David Brown advised that he didn't want to carry a gun, but was afraid enough of Allen to think about it. He also asked if we (the county) would do something about it, because he felt that Allen was going to kill somebody one day (soon) due to his violence and unstable behavior. I explained to him that today, Allen didn't do anything to warrant us placing him into protective custody, or arresting him (as the Browns didn't want to pursue charges against Allen for taking the keys), but that they needed to call each and every time something happened so that we could form a history and maybe get Allen help by getting him into the court system. I also advised the Browns that I would be contacting Adult Protective Services, but that I didn't think they would be able to do anything at this time. They agreed to leave the field at this time, so we followed them past Allen's house (on CR 43) just in case.

At about 1345 hours, a tone was toned out and dispatch advised that there was a gunshot victim on CR 43. Deputy Lara and I then responded and arrived on scene. I observed the John Deere sprayer, facing east, with the red truck behind it. These were all located in front of 398 CR 43, and were within two yellow taped off areas, blocking the scene. I observed a subject laying on the ground, who had already been covered. I observed David and Kevin Brown standing by a silver pickup further west of the red truck I recognized as David's, and the body. I asked David if he was ok, and he advised no. I could tell he was shaken, and upset. I asked what happened and he advised that he and Kevin were headed back (headed eastbound on CR 43) when Max Allen ran towards the pickup. David Brown advised that Allen lunged into the pickup and grabbed the gun that David had inside. The struggle resulted in Allen being shot.

The sheriff and Undersheriff were advised, and I was told that Investigators Loomis and Roberts were enroute to process the scene. Information was gathered from the responding medics, as well as a subject by the name of Tommy Lofton who advised that David Brown had called him. Lofton also made the comment that he had issues with Allen recently.

When Investigator Loomis arrived, the scene was turned over to him.

Case is active.

REPORTING OFFICER	STAR #	APPROVED BY	STAR #
Romero, Erica	C23	Brockett, Michael	C18